

Serial No. 10/791,895  
Response and Request for Reconsideration dated January 9, 2008  
In Reply of Final Office Action dated November 12, 2008

REMARKS

The Final Office Action, dated November 12, 2008, has been received and its contents carefully noted.

In view of the foregoing amendments, and following representations, reconsideration and allowance are respectfully requested.

Applicant points out the following in support of applicant's request for reconsideration and withdrawal of the Finality of the Final Office Action, and in support of the allowance of the claims. This paper is to respond to the points of argument raised by the Patent Examiner, and is submitted to be proper, and entry is respectfully requested.

Entry of this Amendment is submitted to be proper as applicant has raised no new issues and corrected an informality in independent claim 1, and has re-identified the status of withdrawn claims 3, 5, 6, and 13. That is, for sake of good order, the "claim identifiers" of previously withdrawn claims 3, 5, 6, and 13 have been changed to "withdrawn" in accordance with current practice. Further, the amendment should be entered as the corrections of these informalities matters place the application in condition for Allowance.

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First, the August 15, 2008 Remarks are maintained and incorporated herein by reference.

As to Examiner Jackson's "Response to Arguments" on pages 2 and 3 of the Final Office Action, undersigned counsel respectfully submits that U.S. Patent No. 3,508,554 to Sheridan (hereinafter "Sheridan") would not have been "flippable" as argued by the Examiner.

Rather, the Sheridan device can be used in only one way, not just because of the depth markings 10 of Sheridan would have taught away from such, but because Sheridan "distal end 6" is clearly shown as terminating at an angle for insertion into a patient, as shown in Sheridan Figs. 1 and 2, and the related text. The Examiner's reasoning on pages 2 and 3 to the contrary, Sheridan "proximal end 8" would not have been insertable into a patient, as the illustrated, flat, non-angled face of end 8 would have gouged and damaged the tissue on insertion.

It would have been readily appreciated by a person having ordinary skill in the art that the Sheridan ends 6 and 8 had completely different configurations, only one of which would logically -- and safely -- be insertable into a patient's throat.

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In sum, a person having ordinary skill in the art would never have turned around and then inserted the Sheridan device in the wrong direction (i.e., distal end 8 first) into a patient. Thus, contrary to the Examiner's assertion in the sentence linking pages 2 and 3 of the Final Office Action, Sheridan's flat, distal end 8, which would injure a patient, if it were inserted into a patient, does "preclude the usage of the tube in the opposite direction" despite the Examiner's arguments therefor.

Still further, as to lines 3-4 at the top of page 3 of the Action, the Examiner's reasoning to the contrary, a "physician" would not have used "the depth markings; except read them in the opposite direction in order to approximate depth" as such would have been illogical, difficult, and, indeed, risk the safety of the patient.

Even further, contrary to the Examiner's arguments on page 3, lines 5-9, the criticality of Applicant's particularly claimed SHORE hardnesses has support in the specification, as filed. Such is not merely a "design choice" as asserted by the Examiner. Please see, for example, page 7, lines 10-25 of applicant's specification, in which applicant set forth SHORE hardnesses and supported the

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inventive claimed feature that the particular claimed durometer hardnesses relate to:

The distal section 6 which is softer than the intermediate section 4 passes through the throat and into the esophagus with minimal injury to the tissue. The intermediate section 4 follows the distal section 6 without tissue injury. Once the insert or guide T is positioned, the esophageal airway management device is slid onto the insert or guide T and goes into position in the esophagus with minimal injury. (Emphasis added)

Thus, as set forth above, applicant did establish criticality of the claimed SHORE hardnesses in the application, as filed.

The remaining critical features spelled out in the August 15, 2008 Amendment have been incorporated herein by reference.

Thus, Examiner Jackson is requested to consider the above, give weight to each of the particularly claimed features, withdraw the Finality of the rejection, and allow the application.

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Applicant has clearly shown the criticality of applicant's claimed features, and that applicant has claimed the configuration, hardness, and use for two (2) different "end sections". Thus, the Examiner may not dismiss applicant's claim limitations by arguing that criticality has not been shown in the specification. Hence, weight must be given to claim features that set forth such:

g) said intermediate section positionable in the patient's throat comprising a stiff, malleable and ductile material stiffer than said soft malleable and ductile first and second insertable end sections and having a selected hardness of between about 50 SHORE A to about 90 SHORE D;

h) said first and second insertable end sections having a SHORE hardness approximately 20% to approximately 30% less than said selected hardness of said intermediate section;

i) said first insertable end section insertable into a patient's trachea;

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j) said second insertable end section  
insertable into a patient's esophagus; and

k) said first insertable section is  
bent at an angle of about 25° to about 45° with  
respect to said intermediate section. (Emphasis  
added).

The undersigned likewise points out that each inventor is not only a physician and professor at a university, but is well known in the field, and has published journal articles.

In sum, the Examiner is respectfully requested to reconsider his position as regards the previously amended claims, withdraw the rejection, and pass the Application on to issue, as applicant has clearly shown that each one of applicant's two markedly physically different claimed "end sections" has different properties and has only one specific claimed configuration and use.

The Application is submitted to be clearly in condition for allowance, with Claims 1-6, 10-13, and 22-24.

Claims 3, 5, 6, and 13 have been previously withdrawn from consideration.

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Claims 1, 2, 4, 10-12, and 22-24, have been rejected.

Claim 1 is in Independent form.

It is believed that no fee is due for this submission.

However, should that determination be incorrect, Examiner  
Brandon Lee Jackson is hereby authorized to charge any  
deficiencies to our Deposit Account No. 19-2105 and notify  
undersigned counsel in due course.

Should any outstanding formal matters or other issues  
remain, Examiner Jackson is requested to telephone Terrence  
Brown at 703-684-5600 to resolve such.

Respectfully submitted,

Date:

January 9, 2009



Terrence L. B. Brown  
Attorney for Applicant  
Reg. No. 32,685

SHLESINGER, ARKWRIGHT & GARVEY LLP  
1420 King Street, Suite 600  
Alexandria, Virginia 22314  
(703) 684-5600  
TLBB/ad

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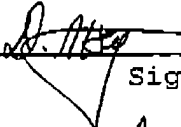
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703-684-5600  
Telephone Number